A PROSECUTOR CONSIDERS THE MODEL PENAL CODE

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"From Richmond to Chelsea, a penny halfpenny . . . from Chelsea to Richmond, a penny halfpenny. From Richmond to Chelsea, it's a quiet float downstream, from Chelsea to Richmond, it's a hard pull upstream. And it's a penny halfpenny either way. Whoever makes the regulations doesn't row a boat."

Boatman, in Robert Bolt's *A Man for All Seasons.*

They laughed at the Wright brothers, and scoffed at the tin lizzie. Lawyers—and, it may be, prosecutors especially—are likely to be traditionalists. Concededly, it is too easy to look at something new, with a viewpoint molded by years of personal experiences and weighed down by ages of inherited lore, and to equate "new" with "visionary," "unrealistic," and "impractical." This is the fear and the nature of the doubts that have flashed the amber caution light at this prosecutor in reviewing the Model Penal Code.

Careful analysis of each of the 346 pages would take considerably more space than does the Code itself. In lieu of such interminable examination, certain aspects of the American Law Institute's Code will be evaluated, with selected samples drawn from it as illustrations. This spot-checking should, it is hoped, provide some key as to those features that prosecutors may deem "good" and those that we may oppose should pressures for their adoption be generated in the several states.

I. THE GOOD

The Code's good features are of all varieties. Its general scheme is praiseworthy, and it has some excellent definitions of substantive offenses and sound gradations of them, some surprisingly realistic and intriguing procedural features, and some sound approaches to ultramodern crime problems and to correction.

A. *General Scheme*

Although the prosecutor who has become at home in the New York Penal Law—one who is used to finding "Abortion" right after "Abduction,"[1] "Husband and Wife" followed immediately by "Ice" and then "Incest,"[2] and "Religion" separated from "Sabbath" by articles dealing with "Riots and Unlawful Assemblies" and "Robbery"[3]—may find New York's traditional alpha-

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1. N.Y. PEN. LAW §§ 70-82.
2. N.Y. PEN. LAW §§ 1090-110.
3. N.Y. PEN. LAW §§ 2070-154.

betical scheme one in which it is generally easy to find one's way around, yet it is not all roses. "Public Safety,"[4] for instance, is a generic term as used in New York's Penal Law, alphabetized under "P," but including within it substantive crimes of "Overloading passenger vessel,"[5] "Carrying and use of dangerous weapons,"[6] and "Riding bicycle on sidewalk or foot-path."[7] In contrast, the Model Penal Code's schematic arrangement, awkward until one has gotten used to it, makes much more sense. It has four main divisions. The first deals with preliminary matters,[8] such as periods of limitations, double jeopardy, standards of proof, intoxication, entrapment, justification, responsibility, attempt, and punishment. The second part sets forth the substantive crimes, subdivided, not alphabetically, but into logical categories and subcategories: "Offenses Involving Danger to the Person,"[9] including homicides, assaults, kidnapping, and sexual offenses; "Offenses Against Property,"[10] including arson, burglary, robbery, theft, and forgery; "Offenses Against the Family,"[11] including bigamy, incest, abortion, and endangering children; "Offenses Against Public Administration,"[12] including bribery, perjury, obstructing government operations, and abuse of office; and "Offenses Against Public Order and Decency,"[13] including riot, disorderly conduct, and public indecency. The third part concerns treatment and correction,[14] while the last and concluding portion details the organization and administration of correction, parole, and probation.[15]

Bless the draftsmen for having eliminated the barnacles that tend, in time, to encrust a working penal code, those absurdities testifying to the alacrity with which legislators, over the years, have responded to the pressures—or the panics—of the moment. One need not journey west of the Hudson to find a jurisdiction in which it is criminal to run horses on a plank road; it is in New York.[16] Nor need one journey to contemporary Germany (East or West) to find it criminal to reproach another for not accepting a challenge to duel; it is in New York.[17] Here, too, college hazing is illegal,[18] it is unlawful to cut ice in front of another's land,[19] to remove timber from

4. N.Y. PEN. LAW §§ 1890-917.
5. N.Y. PEN. LAW § 1890.
6. N.Y. PEN. LAW § 1897.
7. N.Y. PEN. LAW § 1909.
8. MODEL PENAL CODE §§ 1.01-7.09 (Off. Draft 1962). The Model Penal Code is hereinafter cited as MPC. Unless otherwise indicated, all citations are to the 1962 Official Draft.
9. MPC §§ 210.0-13.6.
10. MPC §§ 220.1-24.14.
11. MPC §§ 230.1-.5.
12. MPC §§ 240.0-43.2.
13. MPC §§ 250.1-51.4.
14. MPC §§ 301.1-06.6.
15. MPC §§ 401.1-05.4.
16. N.Y. PEN. LAW § 194.
17. N.Y. PEN. LAW § 734.
18. N.Y. PEN. LAW § 1030.
19. N.Y. PEN. LAW § 1100.

an Onondaga Indian reservation,[20] to induce another into military or naval service by use of drugs,[21] or to plant oysters in the state's waters—this last, however, only if you are a nonresident.[22] The model-makers have stripped their product of these anachronisms; the Model Penal Code contains no such special pleading. Either the offense is covered by a more generic regulation, or coverage—if any—is left not for a state's penal code, but for other areas of its laws.

B. *Good Definitions and Gradations of Substantive Offenses*

Under New York law, disorderly conduct is an offense that, nominally, involves either an intent to breach the peace or a likelihood that it will, in fact, be breached.[23] I say "nominally," because the offense may be committed not only by loud, boisterous, or abusive public action—such conduct as would, ordinarily, directly disturb the peace—but also by stealthily picking a pocket or covertly loitering about a public toilet to solicit men for homosexual activity.[24] Would that the Model Penal Code were to replace New York's hodge-podge in this area! First, the Code limits disorderly conduct to activity that would ordinarily endanger the community's peace and quiet—fighting, violence, tumultuous behavior, the use of coarse display or language, and the creation of hazardous or physically offensive conditions.[25] Second, the Code's disorderly conduct provisions are explicitly designed to deal with "*public* inconvenience," and take considerable care in defining that which is "public" as "affecting or likely to affect persons in a place to which the public or a substantial group has access; among the places included are highways, transport facilities, schools, prisons, apartment houses, places of business or amusement, or any neighborhood."[26] Third, the Code intelligently grades disorderly acts; disorderly conduct is, in most instances, a "violation"[27]—something less than a crime.[28] However, should the actor persist after reasonable warnings or requests to desist, or if his "purpose is to cause substantial harm or serious inconvenience," his offense becomes a "petty misdemeanor."[29] If a number of persons participate jointly in such more serious conduct, *and* refuse to disperse, the offense ceases to be classified as "petty," and becomes a "misdemeanor"—that of "*Failure of Disorderly Persons to Disperse Upon*

20. N.Y. PEN. LAW § 1160.
21. N.Y. PEN. LAW § 1482.
22. N.Y. PEN. LAW § 1550.
23. N.Y. PEN. LAW § 722.
24. N.Y. PEN. LAW § 722(6), (8).
25. MPC § 250.2.
26. MPC § 250.2(1). (Emphasis added.)
27. MPC § 250.2(2).
28. MPC § 1.04 classifies all offenses into crimes (including felonies, misdemeanors or petty misdemeanors) and violations. The latter are offenses punishable by no sentence other than fine, forfeiture, or other civil penalty; they are expressly declared not to be crimes and not to give rise to the consequences that follow criminal conviction.
29. MPC § 250.2(2). Thirty days imprisonment is the maximum permitted for a petty misdemeanor. MPC § 6.08.

Official Order."[30] (In New York State, disorderly conduct may be an offense, a category similar to the Code's "violation," or a misdemeanor, although the elements of the greater, the misdemeanor, contain no item not contained in the lesser.)[31]

Peace officers are commonly called upon to arrest intruders patently having no legitimate business on the premises but who, when questioned, are sophisticated enough to make no statement indicating that they harbored unlawful purposes in entering such places. Although proof of an unauthorized willful entry may be forthcoming, the crime of burglary cannot be made out absent evidence that the actor's intent upon entering was to commit a crime once inside.[32] To handle such cases, the Model Penal Code has an orderly and soundly graded section on criminal trespass.[33] If, knowingly without authority, a person enters (or surreptitiously remains in) a dwelling at night, he commits a misdemeanor—proof of intent to commit a crime therein is not required; if the building entered is not a dwelling or the act has not taken place at night, then the crime is only a petty misdemeanor.[34] Similarly, it is a petty misdemeanor if the actor defied an order personally communicated to him to leave a place that has been fenced, or posted, or one in which trespass has been interdicted in some similar fashion; but he merely commits a violation if the order has not been personally communicated.[35] Affirmative defenses exist if the structure or place was abandoned, was open to the public under conditions with which the actor complied, or if the actor reasonably believed that the owner authorized him to enter or to remain.

The Model Penal Code draftsmen have even made rape fairly orderly.[36] Here, too, they have obliterated distinctions between similarly offensive, but mechanically distinct, items and have graded the crime in a manner seemingly more sensible than present statutory formulations. To accomplish the former, they define sexual intercourse as including "intercourse per os or per anum,"[37] in addition, it is assumed, to normal methods. To accomplish the latter, they have provided that nonconsensual or forcible intercourse with a female not one's wife is a felony. It is a felony of the first degree if either (1) serious bodily injury is inflicted on anyone or (2) the victim is "not a voluntary social companion of the actor" and has "not previously permitted him sexual liberties," and, besides either of these two factors, force or threat of death or serious bodily injury has been used, or the power of control has been impaired

30. MPC § 250.1(2). One year's imprisonment is the maximum permitted for a misdemeanor. MPC § 6.08.
31. N.Y. PEN. LAW §§ 720, 722.
32. See, *e.g.*, N.Y. PEN. LAW §§ 402-05; CLARK & MARSHALL, THE LAW OF CRIMES § 13.06 (6th ed. 1958).
33. MPC § 221.2.
34. MPC § 221.2(1).
35. MPC § 221.2(2).
36. MPC § 213.1.
37. MPC § 213.1(1).

by the surreptitious administration of drugs or intoxicants or the like, or the female is either unconscious or is less than ten years old.[38] Rape is a felony of the second degree if, although one of the latter group of factors is present, no serious bodily injury is suffered and the victim had previously permitted the defendant sexual liberties.[39] The crime is only a felony of the third degree if a lesser threat is used, or if the woman is known to suffer from a mental defect making her incapable of appraising her conduct, or if she is unaware of what is occurring, or falsely believes the defendant to be her husband.[40] A felony in the third degree is also committed by an actor having intercourse with a person less than sixteen years old, when the actor is at least four years older.[41] A misdemeanor is committed when a defendant has intercourse with his ward who is under twenty-one, or with any person in an institution over whom the actor has supervisory authority, or when the female is induced to participate by a disingenuously tendered marriage promise.[42]

And so it goes. The treatment of disorderly conduct and criminal trespass (each graded into violations, petty misdemeanors, and misdemeanors) and rape (graded as misdemeanors and as felonies of all three degrees) illustrates the over-all effort to classify offenses soundly according to their seriousness by placing each offense in a category cutting through the entire codification, and by providing like scopes of punishment for each such category. The logic of the Code's classification is evident when compared with the New York scheme, in which terms of imprisonment are separately provided in the very paragraphs that define the particular substantive crimes, with some felonies punishable by up to three years imprisonment, others five, and still others seven, ten, twenty, and more years, depending more upon the whim of the legislature at the time it specified the particular substantive crime than upon a purposeful determination of aggravating or mitigating circumstances. (No wonder that little or no uniformity prevails today as to judicial sentencing practice, when the sentence for forcible rape under the statute, for instance,

38. *Ibid.* A felony of the first degree is ordinarily punishable by a term having a one to ten years minimum and a twenty years to life maximum. MPC § 6.06(1). Under certain aggravated conditions, specified in § 7.03, imposition of an "extended term" may be in order. Such term for a felony of the first degree has a minimum of five to ten years and a maximum of life imprisonment. MPC § 6.07(1).

39. A felony of the second degree is ordinarily punishable by a term having a minimum of one to three years and a maximum of not more than ten years. MPC § 6.06(2). An extended term for a felony of the second degree has a minimum of one to five years and a maximum of ten to twenty years. MPC § 6.07(2).

40. MPC § 213.1(2). A felony of the third degree is ordinarily punishable by a term having a minimum of one to two years and a maximum of not more than five years. MPC § 6.06(3). An extended term for a felony of the third degree has a minimum of one to three years and a maximum of five to ten years. MPC § 6.07(3).

41. MPC § 213.3(1)(a). MPC § 213.3 deals with corruption of minors and seduction; its suggestion of age sixteen as the cut-off age for "statutory rape," and of a requirement of a four year age spread between the victim and the defendant are offered as tentative suggestions, possibly to be varied by the states considering enactment of the Code's provisions. See MPC § 213.3, status note.

42. MPC § 213.3(1)(b)-(d).

may be the same whether the offense was a brutal attack upon a passing stranger nearly resulting in her death or whether the attacker was an overly amorous boy friend who assumed his inamorata's repeated "noes" were merely her bashful way of saying "yes.") The Code intelligently provides needed flexibility by its arrangements for "extended terms" of imprisonment for convicted felons who are persistent offenders, professional criminals, dangerous mentally abnormal persons, and multiple offenders guilty of extensive criminal conduct,[43] and for convicted misdemeanants who, in analogous respects, represent a special danger to the community.[44]

Inevitably, some persons may carp about particular classifications, suggesting that certain of them are too harsh, and others too lenient. Felony sentences, for example, seem generally not quite as high potentially as under existent New York law, and multiple felony offenders are clearly not as stringently punished. On the other hand, at least heretofore in New York, extended terms for misdemeanors of one to three years imprisonment would have constituted felony sentences. Reasonable men may differ in these areas in which subjective judgments—and consideration of how best to deal with aberrant human behavior—govern the "sorting" of items and further determine what to do about them once the appropriate category has been selected. For instance, in view of some of the Code's other very carefully drawn distinctions, I was surprised at the lumping together as misdemeanants—in the section entitled "Commercial Bribery and Breach of Duty to Act Disinterestedly"[45]—of the trustee, lawyer, physician, or corporate director, who accepts some consideration "to violate a duty of fidelity,"[46] with the "person who holds himself out to the public as being engaged in the business of making disinterested . . . criticism of commodities or services" and accepts some benefit to influence his criticism.[47] Violation of duty by one of the former persons is, it seems to me, inexcusable, and is never taken for granted in our society; violations by the latter, the dining critic for a local newspaper, for instance, are, under some circumstances, understood to be "par for the course." The Code's draftsmen, however, may deem that the broader public impact of the public connoisseur's bias equates it to the more private impact of the fiduciary's wrong. And how can one say, unequivocally, that they are in error?

C. *Realistic and Intriguing Procedural Features*

The line between substance and procedure is often, in the law, a fuzzy one. The Model Penal Code, ostensibly a substantive document, contains a number of items with procedural impact that are clearly beneficial.

43. MPC § 7.03.
44. MPC § 7.04.
45. MPC § 224.8.
46. MPC § 224.8(1).
47. MPC § 224.8(2).

In recent years, California[48] and Pennsylvania[49] have had two-stage trials in cases in which the death sentence might be imposed. The first stage determines solely guilt or innocence, and no punitive recommendations are made by the jurors. The second, commencing after the jury has returned its verdict of guilty of a capital crime, affords that same trial jury an opportunity to hear all the evidence that would logically bear on its judgment as to what sentence ought to be imposed—whether death or life imprisonment. The procedure constitutes what may be described as a cross-examinable oral presentence report, with the jurors, not the judge, rendering judgment as to the appropriate sentence. It is obvious that this second stage can be cumbersome. Gone is the single factual issue for the jury—whether the defendant committed a particular crime at a particular time and place. Now the jurors, required to decide the proper punishment for the defendant, render their judgment with the aid of information concerning not only the nature and circumstances of the crime, but also the defendant's background, his life history, his physical and mental condition, etc. Hearsay, psychiatric testimony, proof of incidents unrelated to the crime, all are considered admissible. However, this potentially top-heavy second stage may be unnecessary; if the crime, a mercy killing, perhaps, is such that the community does not press for the death penalty, why go through the second stage? And so the California-Pennsylvania two-stage procedure has been further refined in the Model Penal Code[50] in order to eliminate, in some circumstances, the second phase and to permit the court to impose noncapital punishment upon a conviction for murder.[51]

Although approving, generally, of the Model Penal Code's scheme for the two-stage verdict in capital cases, I have two quarrels with it, one major, the other minor.

The Code provides, as its alternative to the death penalty, punishment equal to that for a felony of the first degree. This is so whether such punishment is to be imposed by the trial judge acting without the jury, as has been considered, or whether imposed by reason of the jury's vote at the conclusion of the second stage of the trial. The Code provides that punishment for a

48. CAL. PEN. CODE § 190.1.
49. PA. STAT. ANN. tit. 18, § 4701 (Supp. 1962).
50. MPC § 210.6.
51. The court is authorized to impose a noncapital sentence without conducting the second stage when there are no "aggravating circumstances" (*e.g.*, the murder was not committed by an imprisoned convict, the defendant had not previously been convicted for a crime of major violence, a risk of death to many was not created by his act, the murder was not committed in the course of a dangerous felony, etc.), MPC § 210.6(1)(a), (3), when there are substantial "mitigating circumstances" (*e.g.*, the defendant had no significant prior criminal record, the murder was committed while under extreme emotional or mental disturbance, the victim participated in the homicidal act, etc.), MPC § 210.6(1)(b), (4), when the prosecutor consented to a murder plea, when the defendant was under eighteen at the time of the crime, when his physical or mental condition calls for leniency, or when the evidence has not foreclosed *all* doubt as to his guilt. MPC § 210.6(1)(c)-(f).

felony of the first degree is imprisonment for a term having a minimum of one to ten years and a maximum of twenty years to life; or, if an extended term is in order, for a minimum of five to ten years and a maximum of life imprisonment.[52] This is, I believe, an unwise alternative. My objection is not noted, I hasten to add, with prosecutorial fangs whetted for the sight of blood. It is urged out of fear that the hiatus between capital punishment and the prospect of a killer's early release from confinement—in *less than seven years*, even though the sentencing judge may impose upon him the maximum legal term[53]—is so great that community knowledge of the alternatives is likely to force the jurors to invoke the death penalty as the only course that will adequately safeguard their community. The death penalty, I believe, would be less frequently used in contemporary society if its alternative were a life imprisonment term that in fact was either to last for life or at least reasonably certain to stick for an appreciable term of years.

My minor criticism of the Code's two-stage verdict has to do with the burden and the standards of proof. Generally, the Code provides, the People shall have the burden of proving guilt beyond a reasonable doubt.[54] That standard is all very well insofar as it applies to each element of an offense, each being a fact at least theoretically capable of such proof. But how are the People ever to prove "beyond a reasonable doubt" not a fact that has taken place, but what should be done by way of sentence with a defendant who has previously been proven guilty? What is the standard the jurors are to apply when deliberating at the conclusion of the second stage? One would assume that the test is, simply, in their judgment, whether the defendant should be killed or whether he should be sentenced to such imprisonment as the Code provides. But, if this is what the framers had in mind, they should have ventured to articulate it, lest criminal trial judges, habituated to intoning the formula of "proof by the People beyond a reasonable doubt" in all their charges, continue absently to mouth it during the sentencing phase of the two-stage procedure.

Of the other intriguing procedural wrinkles in the Code, one has to do with accomplice testimony. Under New York procedural law, "a conviction

52. See MPC § 7.03.

53. The maximum punishment for a felony of the first degree, even as an extended term, is imprisonment for a term of not less than ten years and not more than life. But the parole provisions of MPC § 305.1 provide that the term shall be reduced by as much as twelve days per month "for especially meritorious behavior or exceptional performance of . . . duties," and that such reductions are to be deducted from the *minimum* term of imprisonment. Hence a model prisoner may, pursuant to the terms of the Model Penal Code, have a term with a ten year minimum reduced by more than a third. This may, in fact, be extremely sound correctional practice, but, realistically, it must be anticipated that it will leave its mark upon the actions of trial jurors who are unlikely to calmly contemplate the defendant as a chastened and subdued man, years in the future, but will picture him, in their deliberations, as the killer whose actions they heard described at the trial.

54. MPC § 1.12(1).

cannot be had upon the testimony of an accomplice, unless he be corroborated . . . ."[55] But when is one an accomplice? Is a thief the accomplice of his receiver, a briber the accomplice of the official he corrupts, an adolescent girl the accomplice of her statutory rapist, a sodomite the accomplice of the sodomized, an abortee the accomplice of the aborter, a perjurer the accomplice of his suborner? The Model Penal Code settles these questions by two provisions. The earlier specifies that "a person is not an accomplice in an offense committed by another person if: (a) he is a victim of that offense; or (b) the offense is so defined that his conduct is inevitably incident to its commission . . . ."[56] Then, recognizing that in deviant sexual situations special rules as to corroboration may soundly be required (possibly because of the special impact of fantasies, blackmail, pride, spite, and all such human weaknesses in this area), the Code ends its "Sexual Offenses" article by providing that "no person shall be convicted of any *felony* under this Article upon the uncorroborated testimony of the alleged victim."[57]

Another wrinkle joyful to the eye of the beholding prosecutor is the Code's provision that "the use of force is not justifiable . . . to resist an arrest which the actor knows is being made by a peace officer, although the arrest is unlawful . . . ."[58] Absent such a statute, the New York Court of Appeals in the calm of the appellate courtroom sanctioned the biting of the thumb of an arresting officer by a defendant during the latter's effort to escape from what hindsight demonstrated was an unlawful arrest.[59] Although passage of this provision of the Code, requiring submission to police authority, may not render mistaken police duty as safe as what may be similarly mistaken appellate court duty, at least line officers will be slightly better protected under it than they are today.

D. *Sound Approaches to Ultramodern Crime Problems and to Correction*

The Model Penal Code has other timely features that particularly adapt it to present life. Its provisions are practical in the way they deal with such contemporary crimes as the theft of services, the unauthorized use of credit cards, the rigging of athletic contests, and the use of the telephone to barass. Thus, the provision on "Theft of Services,"[60] penalizes—the penalty being proportionate to the size of the theft[61]—persons who, without paying, use

55. N.Y. CODE CRIM. PROC. § 399.
56. MPC § 2.06(6).
57. MPC § 213.6(6). (Emphasis added.)
58. MPC § 3.04(2)(a)(i); *accord*, UNIFORM ARREST ACT § 5 ("If a person has reasonable ground to believe that he is being arrested by a peace officer, it is his duty to refrain from using force or any weapon in resisting arrest regardless of whether or not there is a legal basis for the arrest"); Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 345 (1942). See also MPC § 242.6(3).
59. People v. Cherry, 307 N.Y. 308, 121 N.E.2d 238 (1954).
60. MPC § 223.7.
61. MPC § 223.1(2).

telephone services, hotel accommodations, vehicles, and the like. When payment routinely would be made promptly upon the rendering of the service, either refusing to pay or absconding without paying creates a presumption of such theft.[62] The "Credit Cards" section makes it a felony of the third degree to secure property or services exceeding $500 in value by use of a stolen, forged, revoked, cancelled, or otherwise unauthorized credit card; if the value is less, the crime is a misdemeanor.[63] "Rigging Publicly Exhibited Contests" is a misdemeanor; it is a crime on the part of the rigger, the person agreeing to accept any benefit in connection with the rigging, and any person participating in any fashion in a publicly exhibited contest knowing it is not being conducted in compliance with those rules purportedly governing it.[64] The section on "Harassment"[65] makes it a petty misdemeanor to use the telephone other than for legitimate communication, to make repeated communications anonymously or at extremely inconvenient hours, or to harass in other specified ways.

It is difficult for a working prosecutor, whose professional role terminates, for the most part, once the case leaves the courthouse (at least, until it returns by way of either coram nobis or habeas corpus), to contribute meaningful comments on Parts III and IV of this Code—those portions dealing with "Treatment and Correction," and "Organization of Correction." The best that I can do, in this regard, is to comment that, generally, these parts of the Code appear to be both forward looking and practical, and to concede that my bias, strongly in their favor, has been stimulated by the presence on the American Law Institute's Criminal Law Advisory Committee of three of America's most distinguished working correctional authorities: Sanford Bates (formerly New Jersey's Commissioner of Institutions and Agencies), James V. Bennett (for many years Director of the United States Bureau of Prisons), and Russell G. Oswald (distinguished Chairman of the New York State Board of Parole). The views of these life-long tillers in the post-conviction vineyards assure the practicality, as well as the theoretical desirability, of the Model Penal Code's correctional and parole provisions.

One question, however, as to the correctional and parole aspects of the Model Penal Code nags this prosecutor. What are they doing there? Had the American Law Institute desired to encompass the entire criminal field in a single document, then certainly the inclusion of correctional and parole provisions would have been appropriate. But that is something that the Institute has not ventured. Procedural points, for instance, are only touched elliptically, and even the most basic are not specified; we are not informed when an arrest or search can be made, when the trier of fact will be a jury

62. MPC § 223.7(1).
63. MPC § 224.6.
64. MPC § 224.9.
65. MPC § 250.4.

and when a judge or combination of judges, whether or not the grand jury is to be used, when appellate privileges may be exercised, etc. Why, then, lacking such items—and their lack in a penal code is appropriate—does the Model Penal Code specify, in detail, what files are to be kept at certain prisons and what information they are to contain about each prisoner,[66] that prisoners shall be fed and clothed in accordance with correctional department regulations,[67] that correction departments shall have divisions of fiscal control headed by deputy directors whose salaries are to be fixed by the governor,[68] and that female prisoners are not to be kept in the same correctional institutions as are used for men.[69] Should not these items, only of concern after the prison threshold has been crossed, have been relegated to a separate document, a correctional and parole code for instance, so that, like arrest, trial, and appellate procedures, they would remain apart from the penal code?

No more, however, concerning these generally sound features of the Model Penal Code and these small doubts concerning some of them. It may be that the prosecutor, in his natural habitat, is more often attacking the bad than praising virtues.

II. And Now, the Bad

One trouble with being a prosecutor is that we are called in after the damage is done. Usually we see our "clients" after they have become "defendants"—and criticize penal codes after they have been promulgated as "model." A large gathering, classified as "Reporters," "Associate Reporters," "Special Consultants," "Research Associates," "Advisory Committee," "Ex Officio" and "Advisers,"[70] amassed their ideas to produce this 1962 Model Penal Code. Count 'em, seventy-one in all, but not one a working prosecutor who would, were the Code to be adopted tomorrow, be promptly chargeable with making it work. True, a few former prosecutors are found amongst the assemblage, even two or three who were district attorneys when the project was launched more than a decade ago. Alas, however, success has robed them as judges, or other drives have masked them as defense counsel, and like butterflies who were caterpillars, it would seem their former pursuits are now viewed from a quite different vantage point. Or it may be that the changes in prosecution that have taken place during recent years are such that former prosecutors just cannot fully comprehend, or convey to others, the new problems of the old office.[71]

66. See MPC § 303.2.
67. MPC § 304.5(2).
68. MPC § 401.8.
69. MPC § 403.3.
70. For the listing see MPC at iv-vi.
71. Without here suggesting any adverse judgment as to the over-all desirability of the changes that have taken place in the past decade, their major impact on the prosecutor's ability to prove guilt cannot be gainsaid. *Former* prosecutors may fail to appre-

Lest mine eyes seem too clouded by tears welling on behalf of the prosecutorial fraternity, there seem only to be two working defense attorneys crowded in the four-page listing, and the judiciary, it appears, is more amply represented on the appellate than the trial level. This then is a "model" made, appropriately, by model-makers—law professors, sociologists, consultants, psychiatrists, and appellate judges.[72] And, as has been noted, it shares the virtues of many as-yet-untested display models—it is streamlined and modern, with certain admirable and intriguing new features; and it is certain to stimulate a great deal of conversation, and possibly even some buying.[73] But, will it work?

The performance tests, if it were to be adopted, would be made in the criminal courts of our American communities. Lacking, for the present, a companion up-to-date model code of criminal procedure, we must assume working conditions under which this Model Penal Code would be tested analogous to those that exist today. Felonies, it will be assumed, would continue to be tried by judges sitting with jurors whose verdicts would have to be unanimous, and who would be instructed to find "guilt" only upon proof thereof by the People "beyond a reasonable doubt."[74] Misdemeanors would be tried either by judges with juries or by one or more judges sitting without them. Judges—the key to any improvement in the administration of justice, especially if their discretion were to be broadened—would, it is assumed, continue to be picked (whether appointed or elected) largely on a political basis, not through any civil service or other merit or career system that might place greater emphasis upon their legal abilities, dedication, experience, or intelligence. How then would the new Code work with judges, and with judges working with juries, and how practical would it be in protecting both the community and the individuals that constitute it?

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ciate the extent to which these changes have affected the criminal trial—and the criminal trial is the forum in which much of the Model Penal Code would be tested, were it to be adopted. Presenting a case to a jury, and proving guilt beyond a reasonable doubt to all twelve jurors, has become somewhat different since the use of unlawfully obtained items in evidence has been barred, see Mapp v. Ohio, 367 U.S. 643 (1961), since many voluntarily given confessions have been excluded, see Mallory v. United States, 354 U.S. 449 (1957); People v. Noble, 9 N.Y.2d 571, 175 N.E.2d 451, 216 N.Y.S.2d 79 (1961); People v. DiBiasi, 7 N.Y.2d 544, 166 N.E.2d 825, 200 N.Y.S.2d 21 (1960), since wiretap evidence cannot freely be used, see Benanti v. United States, 355 U.S. 96 (1957); Pugach v. Dollinger, 277 F.2d 739 (2d Cir. 1960), *aff'd per curiam*, 365 U.S. 458 (1961), since prior statements of witnesses have been made available to the defense, see Jencks v. United States, 353 U.S. 657 (1957); People v. Rosario, 9 N.Y.2d 286, 173 N.E.2d 881, 213 N.Y.S.2d 448 (1961), since the strongest defense efforts to abuse the prosecutor or to mislead the jurors dare not be met, see People v. Steinhardt, 9 N.Y.2d 267, 173 N.E.2d 871, 213 N.Y.S.2d 434 (1961), and since prosecution summations must be extraordinarily temperate, see People v. Lovello, 1 N.Y.2d 436, 133 N.E.2d 838, 154 N.Y.S.2d 8 (1956); People v. Gioia, 286 App. Div. 528, 145 N.Y.S.2d 495 (1st Dep't 1955).

72. As indicated above, see text following note 65 *supra*, however, *working* correctional and parole personnel were included in the Advisory Committee.

73. Facets of the Model Penal Code have already been adopted by judicial decision, see Roth v. United States, 354 U.S. 476, 487 n.20 (1957), and compare MPC § 251.4 (obscenity), and by legislative action. See note 96 *infra*.

74. Burden of proof is covered in the Code. See MPC § 1.12(1).

A. *Problems Posed for Judges and Juries*

A serious virus infecting the Model Penal Code is its anti-parochialism carried to illogical extremes. The draftsmen have gone too far in shying away from the "little things"; they have overplayed in trying to cover entire "classes" of criminal conduct within single concepts, rather than defining separately, in some detail, similar crimes. For instance, New York law has separate provisions covering the crimes of possession of burglars' tools or instruments,[75] implements used for counterfeiting,[76] gambling implements,[77] wiretapping instruments,[78] and dangerous weapons.[79] The Model Penal Code seeks to include this entire gamut in a single section entitled "Possessing Instruments of Crime; Weapons."[80] The idea, in the abstract, is a fine one, but consideration of the means used to accomplish it reveals that it founders. The first of the section's three subdivisions illustrates the difficulties:

> (1) *Criminal Instruments Generally.* A person commits a misdemeanor if he possesses any instrument of crime with purpose to employ it criminally. "Instrument of crime" means:
>
> (a) anything specially made or specially adapted for criminal use; or
>
> (b) anything commonly used for criminal purposes and possessed by the actor under circumstances which do not negative unlawful purpose.[81]

At grade school, we were warned to be wary of double negatives. The draftsmen have gone us—and prospective jurors—some better; the last phrase of the quoted subdivision contains a triple negative: *"do not," "negative,"* and *"un*lawful."

To see how it works, take one beer can opener, and view it, and the above quoted subdivision (1), against a background of a defendant who has been observed loitering about a line of parked cars, and has been stopped, opener in hand, while huddled over a car having fresh scratches in the vent window's chrome edging. Add police expert testimony that beer can openers are commonly used for prying open vent windows as a prelude to opening locked car doors. Then have this mixture blended by a literal-minded judge. The Model Penal Code charge that will emerge will run something like this: "You must acquit, unless you find that the evidence proves beyond a reasonable doubt that the beer can opener is an instrument commonly used for criminal purposes, and that it was possessed by this defendant under circumstances which do not negative his unlawful purpose." The routine seesawing inherent

75. N.Y. PEN. LAW § 408.
76. N.Y. PEN. LAW § 887(3).
77. N.Y. PEN. LAW §§ 970, 975, 982.
78. N.Y. PEN. LAW § 742.
79. N.Y. PEN. LAW § 1897.
80. MPC § 5.06.
81. MPC § 5.06(1).

in the ancient instruction, "You must acquit, unless . . . ," has become compounded gobbledygook through the addition of this negative-packed coda. In a pre-Model Penal Code jurisdiction, the last part of the charge would have sounded more like this: "and it was possessed by this defendant under circumstances showing his intent to so use it."

An incidental, but significant, instance of this process of creating confusion by avoiding specifics is the Model Penal Code's definition of "pecuniary benefit" in its article on bribery.[82] A "pecuniary benefit"—that which it is forbidden to confer upon a public servant, party officer, or voter—is a "benefit in the form of money, property, commercial interests or anything else the primary significance of which is economic gain."[83] The inclusion of a phrase such as "gift, loan, or reward," though perhaps having less style, would help to alleviate the uncertainty of this definition. Today, the public official whose activities reveal his engagement in personal financial dealings with a benefactor with whom he also has official business is likely to explain it all as simply a "loan." Proving him false beyond a reasonable doubt may be difficult, even though the "loan" be of an oriental rug or interest-free funds with unrecorded terms. Is such a "loan," ostensibly intended to be repaid, a "benefit . . . the primary significance of which is economic gain"? The answer to this query is one of those details that have been sacrificed in streamlining the Code.

While, as has been noted, some portions of the Code strive too hard for simple, broad general principles, and cause confusion in so doing, others confuse because of the draftsmen's too fertile and too fully-expressed imaginations. Today, for instance, in instructing as to culpability, a judge is likely to inform the jurors that criminal intent is necessary, and to further instruct them that a person is presumed to intend the natural consequences of his acts. Such instructions are simple enough, and I know of no reason to believe that they are either poor law or have caused any confusion in the minds of jurors. (Incidentally, such instructions articulate principles so basic to our criminal law that they seem to exist—at least in New York—without any statutory formulation.) Although medieval scholars have not been spotted on the Advisory Committee, the Institute has fashioned a section on culpability[84] that would, I venture, be the envy of those monastics whose hitherto favorite pastime had been debating the number of angels who might dance on the head of a pin.

Dealing with culpability in section 2.02, the Code first tells us, in subdivision (1), that "a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently. . . ." In subdivisions (4)

82. MPC § 240.0-.7.
83. MPC § 240.0(6).
84. MPC § 2.02.

through (10), the Code—in a page and a half—explores, in thin detail, the interrelationship between "purposely," "knowingly," "recklessly," and "negligently," outlining when and how the requirements for these items are satisfied. The second subdivision, that purporting to define the grounds of culpability, is the one, however, that takes the cake. Consider, for example, its definitions of "purposely" and of "knowingly":

> (a) *Purposely.*
> A person acts purposely with respect to a material element of an offense when:
> (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and
> (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.
> (b) *Knowingly.*
> A person acts knowingly with respect to a material element of an offense when:
> (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and
> (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.[85]

If the draftsmen wish to force trial judges to stop and puzzle over abstruse wording, that discipline can do no harm. But the trouble is that the draftsmen are here engaged in linguistic embroidery to which lay jurors would inevitably be exposed. This worries me—and I do not derogate from the individual abilities of lay jurymen. But awkward phrases and shrouded concepts bother me; for instructions in the law—jury charges—are delivered to jurors orally, and may go on for hours. Furthermore, they may contain a variety of precepts with which the jurors have never before had to deal, and concerning which, if a verdict is to be reached, the jurors must all end up as of one mind, convinced beyond a reasonable doubt. Nor can the Code's protagonists—if they are, at this time, to be realists—respond, "these definitions are not for the jury; the judge may simplify them, using his own words, when he charges." Trial judges do not like to be reversed, and the safe course for them is to charge the law precisely as the legislature has handed it down. Being human, they follow the course of safety. And should a judge not do this in the first instance, any able defense attorney, fearing the likelihood that his client's guilt has been sufficiently proven and therefore banking on confusion as the only way to avoid conviction,[86] would be likely to insist that these

85. MPC § 2.02(2)(a)-(b).
86. For a candid, not holier-than-thou, picture of the role of a defense attorney in America see Levy, *The Dilemma of the Criminal Lawyer*, 9 RECORD OF N.Y.C.B.A. 215 (1954).

statutory definitions be read to the jurors, and that they be instructed to acquit unless satisfied, on the proof, that "purposely" or "knowingly," as thus defined, has been established.

Another mental gymnastic in which the draftsmen have engaged centers about "justification" as an affirmative defense, a portion of the Code that considers particularly when the use of force is permissible.[87] This article of the Model Penal Code is so long (twenty-one pages) and contains so many conditions modifying other provisions, which in turn have modified still others, that limitations of space make adequate description impossible. One brief fragment of a single subdivision of this article's eleven sections—the *last* one of which consists of definitions—may, albeit weakly, convey some idea of the problems presented. Having provided, expressly, that force may be used in self-protection,[88] so-called limitations are then expressed:

> (2) *Limitations on Justifying Necessity for Use of Force*
> (a) The use of force is not justifiable under this Section:
> (ii) to resist force used by the occupier or possessor of property or by another person on his behalf, where the actor knows that the person using the force is doing so under a claim of right to protect the property, except that this limitation shall not apply if:
> (1) the actor is a public officer acting in the performance of his duties or a person lawfully assisting him therein or a person making or assisting in a lawful arrest; or
> (2) the actor has been unlawfully dispossessed of the property and is making a re-entry or recaption justified by Section 3.06; or
> (3) the actor believes that such force is necessary to protect himself against death or serious bodily harm.[89]

I do not contend that these permutations and combinations are bad law; rather, I suggest that systematized collections of them do not make good statutes. The American Law Institute, having given us a number of excellent *Restatements of the Law* (*e.g., Contracts, Property, Torts*), has, it seems to me, failed to comprehend the gulf between a good hornbook (or restatement) and a model statute. An intricate network of rules, exceptions, and provisos may be necessary if the restatement is to be accurate, but such fine spun webs make for neither simplicity nor practicality in the statutory area. Were I from a civil law jurisdiction, were I not dealing with principles meant to be applied in a jury trial forum, were I not functioning under rules requiring juror unanimity beyond a reasonable doubt, were our criminal trial forum not one in which confusion is an accredited defense weapon, and were more of our trial judges persons of courage and abundant legal ability, then—conceivably—I might deem the restatement-hornbook approach ac-

87. MPC §§ 3.01-.11.
88. MPC § 3.04.
89. MPC § 3.04(2)(a).

ceptable statutory draftsmanship. But, I am not. American criminal court judges dealing with juries work differently today with statutes than they do with cases and with other secondary authorities. The latter are selectively invoked; in using them, the judges are forced to think and to hand-pick only those authorities or that language that clearly shed light on items to be covered in the charge. Statutes, on the other hand, are expected to paint with a broader brush, and commonly can be readily identified in charges, having been regurgitated virtually intact. For instance, is the crime robbery in the first degree? If so, the trial court can be counted upon to define it initially in the statute's tongue. Does a question of corroboration of accomplice testimony exist? The trial judge, once again, will start his corroboration discourse by quoting the appropriate statute. Is a confession involved? Here too, the statute, when one exists, will be invoked as the prime guide for the jury. True enough, after reading the statutory language, the trial judge will ordinarily add his own explanatory comments, in his own wording (or that from a colleague's charge), or in phrases taken from a case or other authority; but, invariably, the statute will provide the skeleton on which the rest of the meat is hung. I shudder to contemplate that confusingly obese skeleton that will be dragged out in a Model Penal Code jurisdiction whenever a question of "justification," or of "culpability," arises.

Possibly the most intriguing area dealt with by the Institute is that of "Responsibility"[90]—the insanity defense. The initial draft of the Code's proposals concerning responsibility appeared in 1955,[91] the year following the landmark decision of the United States Court of Appeals for the District of Columbia in *Durham v. United States*.[92] This case, widely hailed[93] and broadly rejected,[94] concentrated attention on the defects in the now 120-year-old *M'Naghten* standard;[95] the Institute's proposal—allegedly not as radical as *Durham* but less antediluvian than *M'Naghten*—has received considerable attention, and has even been adopted, in slightly modified form, in several jurisdictions.[96]

> The Institute proposes that the test be:
>
> (1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law.

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90. MPC §§ 4.01-.10.
91. MPC § 4.01 (Tent. Draft No. 4, 1955).
92. 214 F.2d 862 (D.C. Cir. 1954).
93. See Kuh, *The Insanity Defense—An Effort To Combine Law and Reason*, 110 U. PA. L. REV. 771, 789 n.79 (1962).
94. See *id.* at 789 n.81.
95. M'Naghten's Case, 10 Cl. & Fin. 200, 210, 8 Eng. Rep. 718, 722-23 (H.L. 1843).
96. See ILL. ANN. STAT. ch. 38, § 6-2 (Smith-Hurd 1961); VT. STAT. ANN. tit. 13, § 4801 (1958); *cf.* United States v. Currens, 290 F.2d 751, 774 (3d Cir. 1961).

> (2) As used in this Article, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.[97]

Unlike the problems of interminable length and confusing internal cross-referenced modifications that exist in the Code's formulation concerning justification, this definition of "responsibility" is compact; and, unlike the definitions of "purposely" and "knowingly" that have been considered, on its face this definition is comprehensible. But consider the problems that it poses for a criminal trial jury.

Writing elsewhere about the American Law Institute's proposal, I have noted:

> The Institute's draftsmen have hedged the conditions under which mental disorders exculpate by using words of degree—"substantial capacity" and "appreciate." But they have not defined what degrees these words entail. Unlike the word "know," as used in *McNaughton*, which has a common, absolute meaning (at least to laymen), these words were intentionally chosen for their imprecision.[98] The difficulty is that they encourage differences among expert witnesses not over whether the defendant's capacity was impaired but over whether the degree of impairment observed should be deemed "substantial" and over the depths of awareness that must exist before one may be deemed to "appreciate" the criminality of his conduct. Jurors too have their own notions about what these words mean and may often disagree among themselves not because they see the "facts" differently, but because they have no common understanding of the categories into which they must fit those facts.
>
> Ordinarily, this kind of danger is minimized by proper instructions from the bench. But how is a judge to charge a jury under the ALI rule? He could state that "substantial capacity" and "appreciate" were to be defined by reference to the jurors' own beliefs as to whether the defendant's capacity was such that he *ought* to be held responsible. If this is to be the charge, it would encourage jurors, in reaching the verdict, to let their own moral or emotional judgments cut across both the testimony of the experts and the other court-given rules of law. On the other hand, any charge that tries to define these words more precisely than their inherently elusive character permits would negate the very elasticity that the ALI draftsmen meant the words to incorporate.
>
> By its introduction of undefined concepts of degree, the Institute standard is less easily followed by jurors than either *McNaughton* or *Durham*. Ordinarily, vagueness of standards is not desirable in a criminal trial, where jurors must be unanimous and proof must be beyond a reasonable doubt.[99]

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97. MPC § 4.01.

98. MPC § 4.01, comment 4 at 159 (Tent. Draft No. 4, 1955), notes:

> If substantial impairment of capacity is to suffice, there remains the question whether this alone should be the test or whether the criterion should state the principle that measures how substantial it must be. . . . The recommended formulation is content to rest upon the term "substantial" to support the weight of judgment; if capacity is greatly impaired, that presumably should be sufficient.

99. See Kuh, *supra* note 93, at 797-99. (Footnote added.)

The proviso, the second paragraph of the "responsibility" definition that ostensibly prevents the psychopath—the defendant who habitually engages in antisocial conduct but who may not be deemed psychotic—from avoiding conviction under the Model Penal Code's standard, is wholly illusory. In the first place, the word "only" saps it of any potential meaning. What mental abnormality is "manifested *only* by repeated criminal . . . conduct"? Psychiatrists—not just mountebanks, but the most honest ones—would invariably testify that any psychopath would show some other symptom of his psychopathy, even though his antisocial conduct might be its principal outcropping. How, then, are the People ever to meet the burden, should they seek to invoke the proviso, of proving beyond a reasonable doubt that antisocial conduct is the defendant's only symptom? Secondly, and apart from the gimmick word "only," how are the People to be permitted to prove that the defendant comes within the proviso and so must be held responsible? Is the prosecutor to elicit evidence—ordinarily so highly prejudicial that were it inadvertently alluded to a mistrial would be declared in the trial judge's next breath—of other, separate, unconnected crimes, in order to show the jury that the defendant is a psychopath and, under the proviso, not without responsibility? To encourage the People to offer such proof would, one may estimate conservatively, leave most criminal court judges, the entire defense bar, and many prosecutors in a state of high shock. And what is infinitely more important, it would clearly cloud the fairness of many defendants' trials.[100]

Not only does the Code's "insanity" proposal seem to be poor law, but the Institute's psychiatric advisers have noted that it is not good psychiatry.[101] Similarly, in the realm of abnormal human sexual conduct, the Code's

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100. At a hearing conducted by the New York Temporary Commission on Revision of the Penal Law and Criminal Code, on November 29, 1962, at which New York's adoption of the Institute's responsibility standard was considered, Professor Herbert Wechsler, a member of the commission and the Reporter for the Model Penal Code, responded in answer to the suggestion that "the hands of the prosecution would be tied in attempting to show that this conduct was something that had been repeated": "That would not be the point at all. The psychiatrist would get on the witness stand and he would testify that 'in my opinion the person who repeatedly engages in criminal or otherwise antisocial conduct suffers from a mental disease.' That would be the testimony he would offer and the court would rule and the instruction would otherwise be that this concept of mental disease is not what the statute contemplates." See TEMPORARY COMM'N ON REVISION OF THE PENAL LAW & CRIMINAL CODE, INTERIM REPORT 95-96 (N.Y. Legis. Doc. No. 41, 1962). Unfortunately, Professor Wechsler's remark assumes that the proof of other crimes was somehow in the record; how it would be gotten in is not considered. Moreover, assuming that the defense produced as much as a single witness whose testimony, were it to be credited, would tend to indicate that the defendant suffered from a mental disease not *solely* manifested by antisocial conduct, to bar the jury from weighing such proof—regardless of how tenuous it might seem—would be to remove a vital factual issue from the jurors and by so doing to invite appellate reversal.

101. The reportorial staff includes three psychiatrists, see MPC at v-vi; they filed a minority report, dissenting from the Institute's proposal. See Freedman, Guttmacher & Overholser, *Mental Disease or Defect Excluding Responsibility*, 1961 WASH. U.L.Q. 250.

sections on "Sexual Assault"[102] and "Indecent Exposure"[103] seem surprisingly naive. Sexual assault, a misdemeanor, is committed by subjecting a person not one's spouse to a sexual touching under any of a number of enumerated circumstances, one of which is if "he knows that the contact is offensive to the other person."[104] Analogously, indecent exposure exists if one "exposes his genitals under circumstances in which he knows his conduct is likely to cause affront or alarm."[105] As has been noted, in defining "knowingly," the Code talks of being "aware that it is practically certain that his conduct will cause such a result."[106] Applying this definition of knowledge to the sex sections, we end up with a noncriminal situation—regardless of the flagrance of the assault or of the exposure—unless the People can prove, beyond a reasonable doubt, that the defendant was "practically certain" that this bodily contact would be offensive to, or that his exposure would be "likely" to affront, the person at whom it was directed. But does the sex deviate invariably recognize that his attentions are likely to be found objectionable? Is not there such likelihood that he expects that the object of his attentions will respond with interest (if not with bountiful appreciation) that the trier of fact would have to have some reasonable doubt as to whether the defendant knew that his conduct would be "offensive" or would be "likely to cause affront or alarm"?

B. *Other Impractical Aspects of the Code*

The draftsmen of the Model Penal Code, in their quest for theoretical perfection, have sometimes lost sight of the measures used by, and the capacities of, the triers of fact. The Institute seems, on occasion, also to have lost touch with reality in other respects. Take the last considered section, that on sexual assault, as an example. Does the impassioned swain who makes a "pass," having in mind the old proverb "nothing ventured, nothing gained" (should he be so self-deprecating as to recognize that his act was offensive), commit the misdemeanor of sexual assault? By hypothesis, he has subjected someone, not his spouse, to a touching that "he knows . . . is offensive to the other person,"[107] and it is within the section's description that "sexual contact is any touching of the sexual or other intimate parts of the person of another for the purpose of arousing or gratifying sexual desire of either party."[108] If so, what have the model-makers done to the American Boy, who too, apparently, remained unrepresented among the advisers?

A few other examples may further serve to illustrate the Code's lack

102. MPC § 213.4.
103. MPC § 213.5.
104. MPC § 213.4(1).
105. MPC § 213.5.
106. MPC § 2.02(2)(b)(ii), quoted at text accompanying note 85 *supra*.
107. MPC § 213.4(1).
108. MPC § 213.4.

of realism. Consider, for instance, the provision that permits a judge to dismiss an indictment brought against a defendant whose conduct is clearly criminal if he finds that that conduct is "within a customary . . . tolerance,"[109] or has only caused harm "to an extent too trivial to warrant . . . conviction,"[110] or "presents such other extenuations that it cannot reasonably be regarded as envisaged by the legislature . . . ."[111] No consent by the prosecutor is required, nor need he be heard; and the dismissal may take place after jeopardy has attached, with no right to appeal being created.[112] Certainly criminal cases, in which arrests have been made, that cry out for noncriminal treatment will always exist. But words such as "customary tolerance," "too trivial," and "other extenuations" readily lend themselves to the unreviewable whims of individual judges. What then happens to the basic principle of "Equal Justice Under Law"?[113] Should the blue-collar employee be convicted of theft in one case, while his white-collar counterpart makes good his own defalcation and has his case dismissed? Shall the indecently exposed certified public accountant be discharged by the court while the shoemaker, who turned from his last to commit the same offense, faces conviction? At least in those of our communities which are too large and too impersonal for common gossip effectively to keep tabs on cases, those having numerous judges (with varied attitudes), keeping some element of equality in law enforcement is a real problem. Judicial anatomy changes; while, it is said, justice once varied with the chancellor's foot-size, today similar uncertainty exists when judges tell proudly of "ruling with the heart, and not the head." A requirement of prosecutorial consent would, at the least, serve to keep such "hearts" from jolting too irregularly.

In specifying sentence procedure, the Code requires that pre-sentence investigations and reports be made to the judge in certain cases, and provides:

> Before imposing sentence, the Court shall advise the defendant or his counsel of the factual contents and the conclusions of any pre-sentence investigation or psychiatric examination and afford fair opportunity, if the defendant so requests, to controvert them. The sources of confidential information need not, however, be disclosed.[114]

How one is ordinarily to be enabled to controvert a "fact"—other than simply to deny it—that is ascribed to an undisclosed confidential source is nowhere

109. MPC § 2.12(1).
110. MPC § 2.12(2).
111. MPC § 2.12(3).
112. For other sections creating broad judicial discretion in dismissing and in taking pleas see MPC §§ 5.05(2), 6.12-.13; *cf.* MPC § 7.05(4).
113. "One of the most fundamental social interests is that the law shall be uniform and impartial. There must be nothing in its action that savors of prejudice or favor or even arbitrary whim or fitfulness." CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 112 (1921).
114. MPC § 7.07(5).

suggested. Nor are the details of the contravention proceeding specified. Are the social investigators who have collected the report materials to be cross-examined? Today, when unburdened with court appearances, such employees are often difficult to secure and, when employed, are too heavily case-laden. Are nonconfidential sources—relatives, neighbors, former employers, and associates—all to be brought into court? It is not unwise for sentencing henceforth to afford hearings at which the prosecution and defense are to be permitted to probe the intangibles that may color the judge's judgment, although the principal factors influencing sentence—the current conviction and the extent of the prior record—are not ordinarily disputable?

Indeed, will not the potential for these sentencing hearings, coupled with the judges' power to deal harshly with convicted defendants by sentencing them for "extended terms,"[115] and further compounded by the Code's provisions for the nonfinality of felony sentences until one post-sentence year has elapsed,[116] goad courts, presecutors, and defendants into leaguing together to avoid the entire uncertain mess? Today, in busy jurisdictions, pleas of guilty, usually to lesser included crimes, account for the overwhelming portion of dispositions.[117] Acceptance by courts and prosecutors of such pleas, even in iron-clad cases—sometimes with tacit understandings concerning sentence—is mandated by heavy caseloads not permitting the luxury of bringing even a small fraction of the charges to trial. The Model Penal Code provisions would, it is anticipated, tend to make such bargains even more desirable than they are today. To overburdened courts and prosecutors, tendering more generous pleas could serve to avoid the added time pressures necessarily incident to both the Code's new pre-sentence hearings and the potential resentence hearings. Such bargains may prove increasingly attractive to defendants under the Model Penal Code, not only because the People would inevitably be willing to be more lenient, for the aforesaid reasons, but because unless agreements have been reached, extended term sentences might be imposed in appropriate cases. The prospect of procedures so cumbersome and uncertain that their net impact would be to lead to fewer trials is not, I believe, a pleasing one. Most of the vital panoply our criminal procedures

115. See notes 38-40 *supra*.

116. MPC § 7.08(2) provides that felony sentences "shall be deemed tentative . . . for the period of one year following the date when the offender is received in custody by the Department of Correction . . . ." During this period, the department may petition the court to resentence the offender, and the court may, under some circumstances, conduct a hearing on the petition at which the offender "shall have the right to be heard on the issue and to be represented by counsel." MPC § 7.08(4).

117. For instance, from July 1, 1960 through June 30, 1961, in the New York County Court of General Sessions and the County Courts of the other four counties that constitute the City of New York, which courts had jurisdiction over felony charges, there were 3,401 pleas of guilty to felonies and 5,512 pleas of guilty to misdemeanors (a small portion of which were entered during trial), and only 593 jury verdicts, directed acquittals, or disagreements. See JUDICIAL CONFERENCE OF THE STATE OF N.Y., SEVENTH ANNUAL REPORT 209 (N.Y. Legis. Doc. No. 90, 1962).

afford is surrendered by the defendant who pleads guilty; he may do so—regardless of guilt, remorse, or belief in the provability of his guilt—because the proferred bargain attractively eliminates the gamble that, if convicted, he will draw a whopping jail term. Nor is the community fully protected when such bargain permits an alleged robber to plead to assault or larceny in order to escape conviction for a more serious charge.

The Institute has tempered justice with neither mercy nor practicality in its "Bail Jumping" section:

> A person set at liberty by court order, with or without bail, upon condition that he will subsequently appear at a specified time and place, commits a misdemeanor if, without lawful excuse, he fails to appear at that time and place. . . .[118]

Defendants who in fact have failed to appear when scheduled tender a variety of excuses: some claim they waited in the wrong courtroom or forgot; still other profess to have taken the wrong subway or to have misunderstood their instructions. Rarely, if ever, does one say he looked into the courtroom, saw a tough judge on the bench, and then, with or without the advice of counsel, hastened home. The important thing, however, is that, statistically, most of them will show up within the next few days or weeks. And their default is punishable by noncriminal means: their bail may be ordered forfeited. But should they also be saddled with the further criminal charge of bail jumping, already busy jurisdictions are likely to be busier then ever. More sensibly, in New York State, that crime is not committed until the nonappearing defendant "does not appear or surrender himself *within thirty days.*"[119]

III. Conclusion

In considering the Model Penal Code, and some examples of its "good" aspects and some instances of the "bad," I have not alluded to legislative realities. In its decade of work on the Code, major policy decisions were made by the Institute, notably in the area of sex crimes, that might—whether or not deemed sound—take an age or more to sell to any state legislature. Under the Code, deviate sexual activity is never criminal when engaged in by consenting rational and conscious adults, or by adults having animals as partners.[120] The Code makes it a defense to nonviolent sexual misconduct with a child that the "alleged victim had, prior to the time of the offense charged, engaged promiscuously in sexual relations with others."[121] And not only does the Code provide a procedure for authorizing certain abortions,

118. MPC § 242.8.
119. N.Y. Pen. Law § 1694-a. (Emphasis added.)
120. See MPC § 213.2.
121. MPC § 213.6(4).

under specified conditions,[122] but self-abortion prior to the twenty-sixth week of pregnancy would not seem to be criminal at all, although any co-conspirator thereto would be guilty of a felony.[123] Whether this last can be deemed "progress" by any standard—or whether it will encourage untutored self-butchery—would seem at least arguable.

Twelve numbered "Tentative Drafts" of various portions of this Code were prepared and considered by the Institute during the decade prior to May 24, 1962, when the Proposed Official Draft was adopted as the Model Penal Code. Would that the clock might be, tentatively, turned back, and that final draft renumbered "Thirteen"! Then, with the aid of criminal *trial* judges, defense *trial* counsel, and *trial* prosecutors, and with the votes of such working judges and advocates weighted to assure the dominance of their suggestions, a realistic final draft might emerge.

"The life of the law," said Holmes, *"has not been logic; it has been experience."*[124]

122. MPC § 230.3(2)-(3).
123. MPC § 230.3(4).
124. HOLMES, THE COMMON LAW 1 (1881). (Emphasis added.)